Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1836

THOMAS TIDMORE,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

MOTION

To Deny Writ of Certiorari to Review the Opinion and Judgment of the Alabama Court of Criminal Appeals

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The Respondent respectfully prays that the Writ of Certiorari be denied to review the opinion and judgment of the Alabama Court of Criminal Appeals entered against the Petitioner on December 20, 1977.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals is cited at Ala. Cr. App., 356 So.2d 231. It is appended to the Petitioner's Arguments and filed in this Honorable Court marked, Appendix A 1-7. It is correct with the exception of the misspelling of the word Appellant, the last word in the last paragraph on page A 1. No reversible error or errors were committed by the trial court.

JURISDICTION

This Court's jurisdiction *may* be invoked under Title 28 U.S.C.A. § 1257. (Emphasis added)

The following portion of United States Supreme Court Rule 19 is material to the pending case. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The issues raised by the Petitioner do *not* in the opinion of the writer present new questions for the first time nor present any special or important reasons for granting a writ of certiorari and is not a case of first impression. (Emphasis added) The following quotation is applicable in view of the fact that no new question is being presented for the first time:

> "A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is a 'case of first impression.' People v. Pestronk, 157 N.Y.S. 2d 492, 493, 3 Misc.2d 845."

QUESTIONS PRESENTED

1. Was the property in the Petitioner's possession the subject of an unreasonable search and seizure which resulted in violation of his rights under the Fourth Amendment to the United States Constitution?

2. Did Petitioner receive a speedy trial pursuant to the Sixth Amendment to the United States Constitution?

3. Was Petitioner tried by an impartial jury pursuant to the Sixth Amendment to the United States Constitution?

STATEMENT OF THE CASE

The Petitioner was charged and convicted of violating Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended.

> "It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the city or the police jurisdiction thereof, any obscene matter."

In the obscene motion film entitled "Illusions of Love" the jury assessed a fine of $300.00 and the Court imposed 150 days hard labor to be performed by the Petitioner for the City of Birmingham.

Motions to Dismiss the Complaint, Suppress the Evidence and Quash the Search Warrant were properly overruled by the trial court.

Motions referred to in this brief and argument will be prefixed by an "M" and transcript of the jury trial by a "T".

REASONS FOR DENYING THE WRIT

No new substantial constitutional question is presented.

No unreasonable search and seizure of property in the Petitioner's possession is supported by the evidence.

In *Heller v. New York*, 93 S.Ct. 2789 (1973), the Court stated:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party the seizure is constitutionally permissible."

Since the law was complied with by the City of Birmingham the Petitioner's Motion to Quash the Evidence was properly overruled.

The affidavit in the search warrant did *not* contain conclusory assertions of Officer David Luker, and the magistrate did focus searchingly on the issue of obscenity *vel non* (T.p.105). (Emphasis added)

A search warrant may be issued only on probable cause supported by affidavits made before the issuing authority, name or describing the person under suspicion and particularly describing the property to be searched for and the place to be searched.

> Section 15-5-3, Code of Alabama 1975;
> Section 28-4-254, Code of Alabama 1975;
> *Bull v. Armstrong*, 48 So.2d 467, 254 Ala. 390.

In this case before this Honorable Court the Code sections and case law have been complied with by the City of Birmingham. (T. pages 105 and 106)

BANTAM BOOKS, FREEDMAN, LEE ART, are cited by the Petitioner on pages 10 and 11 of his petition. I assume he is alleging that the search warrants were issued based on the conclusory assertion of a police officer and the magistrate did not focus searchingly on the question of obscenity. The factual issues in those citations are *not* relevant to this pending case. (Emphasis added) He has failed to set forth the specific facts which resulted in the alleged unreasonable search and seizure.

In BANTAM BOOKS the Supreme Court of the United States of America declared the Rhode Island law creating a Commission to Encourage Morality in Youth unconstitutional. Those facts are inapplicable to the case at bar.

The FREEDMAN case held that a motion pictture censoring statute failed to provide adequate safeguards against undue inhibition of protected expression and was thereby unconstitutional. This is obviously also inapplicable to the facts in relation to the case at bar.

Finally, in LEE ART (1968 case) the Court went so far as to suggest that it was an open question whether a judge need view the motion picture before issuing the warrant. In *Heller v. New York* (1973 case), previously cited on page four of this brief, this issue was resolved as follows:

> "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party the seizure is constitutionally permissible."

The Petitioner, Thomas Tidmore, was afforded a speedy trial. There is nothing on the Trial Docket (T. pages 98 and 99) indicating Thomas Tidmore ever made a Motion for a Speedy Trial nor a Motion to Dismiss for the Lack of a Speedy

Trial *prior to February 22, 1977 (date of trial)* (T. page 92). (Emphasis added) He therefore failed to preserve said right. The Court (M. pages 42-44) set forth all the details which were involved and also a portion of the basis of the continuance is also reflected on the Trial Docket (T. pages 98 and 99).

In order to preserve a right to a speedy trial, it must be affirmatively shown by a defendant that demand for trial was made, and objection to postponement was made, or some other effort was made to secure a trial. U.S.C.A. Const. Amend. 5, 6, 14.

Robinson v. State, 248 So.2d 583, 46 Ala. App. 684.

The Petitioner cites *Barker v. Wingo*, 407 U.S. 514. In that case there was more than a five (5) year delay between the arrest and trial of the defendant. His first complaint was 3½ years after he was arrested. The Court ruled that the defendant was *not* seriously prejudiced by the delay. (Emphasis added)

In the case at bar, the Petitioner was arrested on January 27, 1976 and tried on February 22, 1977. *Less* than one year's delay was involved. (Emphasis added)

The Court in the BARKER case set forth the criteria regarding a speedy trial:

Length of and the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. It is determined on *ad hoc* basis in which the conduct of the prosecution and that of the defendant are weighed.

Petitioner further cites *Strunk v. U.S.*, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56. In *Moore v. Arizona*, 94 S.Ct. 188 at the bottom of page 190 it refers to *Strunk* and states that no court shall overlook the possible impact pending charges might have on his prospects for parole and meaningful rehabilitation. *Neither of these facts are involved in the pending case.* (Emphasis added)

Reference is made to *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 by Petitioner. This case involved the State of Arizona extraditing the defendant from the State of California or dropping the detainer against him. *Neither extradition nor a detainer are involved in the pending case.* (Emphasis added)

Honorable William H. Cole the trial judge explained the delay in the trial of the Petitioner as follows:

> "The City appeals docket is set one week a month. It is the policy of this Court on pornograph—as a matter of fact, anything else—we will only try one pornograph per month because then we have got the jury, in our judgment, we got the jury tainted, having seen one pornographic movie, we don't want to try another one because then we've got trouble getting jurors." (T. p. 3 Q)

The record reveals no request for or objection to any continuance by either the City or the defense. The Petitioner never requested a speedy trial. A Motion to Dismiss was filed by the Petitioner on February 22, 1977, (the date of trial) it attempted to raise the question of the failure to afford the Petitioner a speedy trial.

A Defendant is not entitled to raise an issue as to a denial of a speedy trial absent an attempt, prior to the trial date, to bring to the attention of the court the alleged denial of a speedy trial. *Hodges v. State*, 48 Ala. App. 217, 263 So.2d 518 (1972).

The Petitioner did not make a *prima facie* case for release on grounds of the denial of a speedy trial and has not even alleged that any actual prejudice resulted from the fact that trial was delayed. *Sellers v. State*, 48 Ala. App. 178, 263 So. 2d 156 (1972).

A Defendant who makes no outcry when there was a delay in his trial is deemed to have waived his right to a speedy trial. *Autrey v. State*, 44 Ala. App. 53, 202 So.2d 88, cert. denied, 88 S.Ct. 1422, 390 U.S. 1030, 20 L.Ed. 2d 287 (1967); *Broadnax v. State*, 54 Ala. App. 546, 310 So.2d 265 (1975).

It is fundamental that an accused must affirmatively exercise his right to a speedy trial. *Mayberry v. State*, 51 Ala. App. 343, 285 So.2d 507, cert. denied, 291 Ala. 792, 285 So.2d 512, cert. denied, 94 S.Ct. 1438, 415 U.S. 929, 39 L.Ed.2d 486 (1972). Since there was no effort on the part of the Petitioner to secure his right to a speedy trial prior to the day of trial, he may not complain of any delay on appeal. *Harmon v. State*, 48 Ala. App. 521, 266 So.2d 325, cert. denied, 289 Ala. 744, 266 So.2d 328 (1972); *Moulden v. State*, 47 Ala. App. 573, 258 So.2d 915 (1972).

Petitioner Tidmore's failure to make an express demand for immediate trial did not entitle him to complain later about any delays. *Scott v. State*, 227 So.2d 436, 45 Ala. App. 149.

Where neither accused nor anyone on his behalf made request for speedy trial, accused was not entitled to discharge on ground of delay. *Washington v. State*, 277 So.2d 805, 45 Ala. App. 173.

The Petitioner was *not* denied an impartial jury trial. (Emphasis added) He alleges that the Court's failure to excuse four (4) jurors for cause resulted in denying him the effective use of his peremptory challenges.

On voir dire examination of the jury panel, defense counsel asked the following question:

> "If during the course of the trial of this case the evidence shows that Tom Tidmore showed or caused to be shown

> in the City of Birmingham a movie which depicted acts of sexual intercourse including cunnilingus, fellatio, homosexuality and bisexuality, would you merely because of that be prejudiced against him?" (M. p. 23)

Five (5) jurors responded: Mr. Crabtree, Mr. Parker, Mrs. McLaughlin, Mrs. Keith and Mrs. Grace. The trial judge then instructed the jury on its duties, responsibilities and that the jury must decide whether or not the film was obscene based on certain criteria under the law and upon which the jury would be instructed.

Juror Grace then responded that she could be guided by the law, as did Jurors Keith and Crabtree. (M. p. 27) Juror McLaughlin was excused by the court. (M. p. 28) Subsequently defense counsel requested that Jurors Crabtree, Grace, Keith, and Parker be excused for cause. The court then overruled this request with the following comment.

> "My recollection of when I explained to them, namely the charge and the fact that not their personal evaluation is involved, and as we all know, it is contemporary community standards. I think each of them individually answered they would base it on the law in the case and the evidence in the case so I am going to overrule it." (M. p. 36)

The City then asked a few questions of the jurors whereupon the trial court, in an abundance of caution, again inquired of the jurors:

> "I think I am going to ask a question to make sure I understand correctly. I think I do but to make sure, Mrs. Grace, Mrs. Keith, Mr. Parker, Mr. Crabtree, this may be a duplication but I want to make sure that I am correct.
>
> "In answer to the question that you would be prejudiced—would anyone be prejudiced against the defendant

because they showed a certain picture with certain acts, then I explained the law and what the proof had to be and particularly I have emphasized that you must be guided by the law and I want you all to be very candid about it, that is really what we are here for, and we want to make very sure everyone is as impartial as is humanly possible for people to be, realizing we are all people. Are you sure, Mrs. Grace, you wouldn't be—understanding the law and seeing this picture, do you—are you sure that you would not be prejudiced against the defendant but would base it solely on the——

"The Juror: Right, after your explanation.

"The Court: Mrs. Keith?

"The Juror: I could do it, with the law. I could do it.

"The Court: Mr. Parker?

"The Juror: Applying the federal law to it?

"The Court: Yes, it is really Alabama law, too. I used the United States Supreme Court because that is where over the years case after case has come out of, but this is Alabama law, in fact, right now as far as I know. It changes frequently.

Mr. Crabtree?

"The Juror: Yes, sir, I think I could.

"The Court: All right, I will overrule the motion again." (M. pages 37 & 38)

The action of the trial court in overruling the motion to excuse the jurors for cause was proper. The principles of law involved are clear and are concisely set forth under 50 C.J.S. 998-999, Juries, § 242.

"A juror is incompetent who has such personal opinions with respect to the subject matter of the suit, or con-

scientious scruples on any subject, as would influence his verdict, . . ., or who has a fixed opinion as to any of the main issued involved.

• • •

"In general the same test which determines whether a juror's opinions as to the guilt or innocence of accused disqualifies him, . . ., is applied to determine whether a juror's scruples will disqualify him; that is, can he eliminate the influence of his scruples and render a verdict according to the evidence? Ordinarily he is not disqualified where it appears that he is entirely willing to accept the law as laid down by the court and able to decide the case impartially according to the evidence. The determination of this question is based on the juror's answers and demeanor and is within the sound discretion of the trial judge."

Thus, where jurors testify that they have opinions but that they would try the case fairly and impartially according to the law and the evidence, and that their opinions would not reflect their verdict, those jurors are competent to serve. *Godau v. State*, 179 Ala. 27, 60 So. 908 (1913); *Strickland v. State*, 151 Ala. 31, 44 So. 90 (1907); *Huddleston v. State*, 37 Ala. App. 57, 64 So.2d 90, cert. denied, 258 Ala. 579, 64 So.2d 102 (1953). Petitioner cites *Wilson v. State*, 243 Ala. 1, 8 So.2d 422 (1942 case). It stands for the general principle that in criminal cases the defendant is entitled to a fair trial by an impartial jury. The facts in that case have no resemblance to the case at bar and further *Wilson* involved an alleged homicide.

Leach v. State, 31 Ala. App. 390, 18 So.2d 285 (1944 case), cited by the Petitioner is inapplicable to the case at bar because there one (1) juror did *not* answer a question on voir dire examination and thereby failed to disclose that he had

served as Deputy Sheriff for fifteen (15) years and such concealment warranted a new trial. *In the case at bar no failure to disclose is involved.* (Emphasis added)

To disqualify a prospective juror, he must have more than a bias, or fixed opinion, as to the guilt or innocence of the accused. Such opinion must be so fixed as that it would bias the verdict a juror would be required to render. *McCorvey v. State*, Ala. Cr. App., 339 So.2d 1053, cert. denied, 339 So.2d 1058 (1976); *Hammil v. State*, 90 Ala. 37 (1890).

The trial court did *not* err in refusing to excuse for cause particular jurors. (Emphasis added)

Procedure in which jurors who, when asked if they had fixed opinions, had given equivocal answers, were further interrogated and found to have been able to conscientiously lay aside their predilections and go by the evidence. *Mathis v. State*, 296 So.2d 760, 52 Ala. App. 674.

The law is well settled that a defendant has *no* constitutional right to a trial by any particular jury or jurors, but has the right to trial by a competent and impartial jury. (Emphasis added) 42 Am. Jr. 2d at 647.

A juror, though having previously expressed opinion regarding a defendant's guilt, is *not* disqualified if he states unqualifiedly that, as a juror, he can find a true verdict on the evidence alone. (Emphasis added) *Hawkins v. State*, 29 Ala. App. 221, 195 So. 762; *Peterson v. State*, 227 Ala. App. 361, 150 So. 156; *Thomas v. State*, 150 Ala. App. 31, 43 So. 371; *Ragsdale v. State*, 134 Ala. App. 24, 32 So. 674; *Jackson v. State*, 77 Ala. App. 18; *Willingham v. State*, 262 Ala. 550, 80 So. 2d 280.

Trial judge's inference from voir dire that prospective juror was not subject to challenge for favor or bias was not erroneous.

Section 12-16-150, Code of Alabama 1975;
Felton v. State, 246 So.2d 467, 46 Ala. App. 579.

The trial judge's actions are presumptively correct, in the absence of a showing to the contrary.

Ballard v. State, 236 Ala. 541, 184 So. 260.

It was not error for the Court to inquire of the veniremen if they or any of them had a fixed opinion as to the guilt or innocence of the accused. Indeed, it was his duty to do so. If the manner in which the court conducted such inquiry resulted in prejudicial error to the accused, it is his duty to show such error. It cannot be presumed.

Kabase v. State, 31 Ala. App. 77, 12 So.2d 758, cert. denied 244 Ala. 182, 12 So.2d 766;
Fuller v. State, 118 So.2d 153;
Section 12-16-6, Code of Alabama 1975;
Section 12-16-150, Code of Alabama 1975;
Constitution of Alabama 1901, Section 6.

Statute giving a party the right to examine jurors as to their qualifications, interests or bias does not in any way diminish trial court's discretion in such matters.

Finley v. State, 295 So.2d 428, 292 Ala. 424;
Code of Alabama 1940, Title 30, Section 52.

Ruling of trial court as to bias or prejudice of a juror is largely discretionary.

Clendon v. Yarbrough, 171 So. 277, 233 Ala. 269.

The following omissions appear in Petitioner's Brief and Argument:

(a) Page six (6), paragraph two (2) he omitted the following words from the Court's charge, *and look at the evidence, and hear the evidence* (M. p. 26). (Emphasis added)

(b) Page eight (8), ninth (9) paragraph, next to last line, number omitted after *Appendix No.* (Emphasis added).

(c) Pages A8-A10. On page A8 the word *felony* remains, it was stricken through on the original search warrant. Please see (T. page 105). Page A9, a portion of the next to last sentence in the affidavit was incorrectly quoted, it was stated "of female actors", actually it was "*of a female actor*" (T. p. 105). (Emphasis added)

Further, the magistrate signed his name which was omitted, it was *R. Larry Morris* (T. p. 105). (Emphasis added)

The search warrant was also signed by the magistrate, his name being omitted again, *R. Larry Morris* (T. p. 105). (Emphasis added)

None of the alleged violations of Thomas Tidmore's Constitutional rights are supported by the record. (Emphasis added)

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be denied to review the opinion and judgment of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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